In the Court of Criminal Appeals of the State of Texas

EX PARTE JORDAN BARTLETT JONES, APPELLANT

On Appeal from the Twelfth Court of Appeals

Cause No. 12-17-00346-CR

Brief of Amicus Curiae by Benjamin Barber

In Support of Motion to Reconsider

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Introduction and Statement of Amicus Curiae

Benjamin Barber submits this brief as amicus curiae in support of Jones, and in opposition of section 21.16 of the Texas Penal Code, entitled "Unlawful Disclosure or Promotion of Intimate Visual Material." Barber files the brief because he is currently litigating a similar bill in Oregon ORS 163.472 entitled "Unlawful Dissemination of an Intimate Image", and has standing under the first amendment as a potential recipient of the speech at question here, and intends to raise issues that have not been previously raised, and addresses the shortcoming of the decisions by this court. Moreover the court decides a dangerous precedent, that a person can be jailed for publishing true "private facts" lawfully obtained, and thus could by extension criminalize the act of gossiping.

Errors of Law

1. The consent provision of the statute renders it a license based prior restraint of pure speech on the basis of a heckler's veto, and the court has never allowed such a prior restraint of speech based upon the unfettered discretion of private people.
2. The statute is both a content and viewpoint based restriction of speech, by punishing only some disclosures of private facts and not others, which is subject to a higher burden than just content based statutes
3. Privacy protections can only be a "compelling state interest", if the state must articulate the specific notion of privacy, some of which are constitutionally infirm or are subject to affirmative defenses which are not located in the statute.
4. Criminal restrictions on the first amendment are to prevent speech as being used as the means to achieve a separate unlawful ends, rather than the suppression of

ideas themselves which is what the aim of this statues is, thus an invasion of privacy is a crime but not a dissemination of information unlawfully obtained.

5. A “recklessness” standard is not lawful for statutes criminalizing speech, because it does not allow for the “breathing space” that is required under the First Amendment to not chill lawful, given the various vague and uncertain clauses.
6. The statute is both vague and overbroad, because it requires anticipating another person's state of mind regarding “effective consent”, moreover whether a person had a “reasonable expectation” of privacy without the required defenses.
7. The statute is actually artfully plead copyright claim, and is thus completely preempted by the copyright act 17 USC 301, because it seeks to control the dissemination of copyrighted works, not information unlawfully obtained.

The court has paradoxically claimed “There does not seem to be a dispute that the classic "revenge porn" scenario—two people take intimate sexual photographs, and one person decides to post them on the Internet without the consent of the other—could be a viable set of facts to support the prosecution of the person who disseminates the pictures.” and also that the decision of US v. Stevens regarding rules for content based criminal statutes “inexplicable”, because the decision in Broadrick v. Oklahoma regarding content based civil statutes regulating government officials speech 35 years prior.

The court then reasons that the statute can be held to be constitutional, because: “disclosing visual material when the depicted person reasonably expected it would

remain private is an intolerable invasion of privacy, especially when the visual material shows the depicted person's intimate parts or sexual conduct."

The court indicated that the defendants did not make a good argument regarding the substantial overbreadth, The first amendment only allows criminal regulations of speech that are within a historically unprotected category of speech, and even if they are within that category of speech, they are overbroad if they can punish speech which is historically protected. Hence the government can punish people disseminating social security numbers, when that speech is integral to criminal conduct as a part of fraud, but cannot punish disseminating those same numbers for purposes unrelated to fraud such as doing background checks. Likewise the state can only punish the unlawfully obtaining information by invading their privacy, however journalists have been protected from disseminating information that was unlawfully obtained by others. See e.g. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001) see also Florida Star v. BJF, 491 US 524, 541 (1989)

> We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order,

This decision is also in complete opposite of a previous decision by the court of appeals in Anonsen v. Donahue, 857 SW 2d 700 - Tex: Court of Appeals 1993

> "After Booher's husband left her and filed for divorce in 1988, she wrote a letter about the rape and sent it to four nationally broadcast talk shows. Booher was motivated by revenge and the desire to sell a book about her life."
> {...}
> "The question before the Court is whether a person's right to make public the most private details of their own life is limited when the information also reveals painful intimacies of other persons. We find that it is not."

concluding:

> "In the context of their personal stories, which were undoubtedly theirs to tell, both Campbell's and Dresbach's revelations of private facts about others involved in their lives were protected by the first amendment. We find that

> Booher's rights are similarly protected. As appellees suggest, to hold otherwise would be to imply that one's autobiography must be written anonymously."

This is because there is no free standing right to control information that is disseminated about you, that is the essence of the heckler's veto doctrine, and as described by the US Supreme Court in Time, Inc. v. Hill, 385 US 374, 388 (1967)

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Likewise other state supreme courts have found similarly, such as Anderson v. Fisher Broadcasting Co., 300 Or. 452, 712 P. 2d 803, 814 (1986)

> "the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not "newsworthy," does not give rise to common-law tort liability for damages for mental or emotional distress, unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings."
> {...}
> "Privacy" denotes a personal or cultural value placed on seclusion or personal control over access to places or things, thoughts or acts. "Privacy" also can be used to label one or more legally recognized interests, and this court has so used the term in several cases since Hinish. But like the older word "property," which it partially overlaps, "privacy" has been a difficult legal concept to delimit.[5] Lawyers and theorists debate the nature of the interests that privacy law means to protect, the criteria of wrongful invasions of those interests, and the matching of remedies to the identified interests. These questions confront us in the present case.
> {...}
> Thirty years ago, Professors Harper and James placed tort actions for "invasion of privacy" in their chapter on "Recovery for Emotional Disturbance," recognizing that psychic or emotional reactions simultaneously defined both the injured interest and the harm resulting from its infringement. Harper and James, The Law of Torts 677-91 (1956). They though that the "astonishing enthusiasm" for invasion of privacy as an independent cause of action reflected technological and social pressures creating "many new sensitivities," but they noted that the new concept quickly became "a catchall for a great number of cases in which mental

> suffering or emotional distress was the primary injury sustained and for which no other substantive theory for relief was available." Id. at 682-84."

Anderson v. Fisher Broadcasting Co. 712 P. 2d at 808

It is for that reason that when a statute that defines a crime based upon a person "when the depicted person reasonably expected it would remain private", it is not the case that it is equivalent to " an intolerable invasion of privacy", because emotional distress is not a compelling state interest pursuant to the First Amendment. See e.g. Boos v. Barry, 485 US 312 - Supreme Court 1988

> "we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide "adequate `breathing space' to the freedoms protected by the First Amendment." Hustler Magazine, Inc. v. Falwell, ante, at 56. See also, e. g., New York Times Co. v. Sullivan, 376 U. S., at 270. A "dignity" standard, like the "outrageousness" standard that we rejected in Hustler, is so inherently subjective that it would be inconsistent with "our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience." Hustler Magazine, supra, at 55."

See also U.S. West v. Federal Communications Comm 182 F.3d 1224, 1235 (10th Cir. 1999)

> In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity. Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under Central Hudson for it is not based on an identified harm.

The reason why that this law was passed, was because the scenario that the Texas Supreme Court uses is not an invasion of privacy at all because:

> "the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith, 442 U.S., at 743-744, 99 S.Ct. 2577. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." United States v. Miller, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976).

Carpenter v. US, 138 S. Ct. 2206, 2216 (2018)

Instead what the statute purports to do is to create a prior restraint of speech based upon the licensing scheme requiring "effective consent", if the defendant is required to seek consent prior to the speech taking place, or alternatively creating a "heckler's veto" of speech when a person objects to the speech withholding "effective consent". The original system of prior restraints of speech in England, were a license from the Stationers Company, which was required before publishing a book, but was eventually replaced by the Statute of Anne, which was the first copyright statute, giving authors the exclusive right to authorize the printing of their books.

Prior restraints of speech have a higher burden against constitutionality, where a content based statute is "presumptively invalid", and the government "bears the burden to rebut the presumption", a prior restraint:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 70 (1963); see also Near v. Minnesota, 283 U. S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U. S. 415, 419 (1971).

New York Times Co. v. United States, 403 US 713, 714 (1971)

See also FW/PBS, Inc. v. Dallas, 493 US 215, 246 (1990) ("the criteria used in deciding whether or not to grant a license is deemed to convert an otherwise valid law into an unconstitutional prior restraint.")

See also Forsyth County v. Nationalist Movement, 505 US 123, 131 (1992)

> "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." Shuttlesworth, 394 U. S., at 150-151; see also Niemotko, 340 U. S., at 271. The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," Cantwell v. Connecticut, 310 U. S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted, Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546, 553 (1975).

See also Hill v. Colorado, 530 US 703, 734 n.43 (2000)

> While we have in prior cases found governmental grants of power to private actors constitutionally problematic, those cases are distinguishable. In those cases, the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners. See, e. g., Reno v. American Civil Liberties Union, 521 U. S. 844, 880 (1997) ("It would confer broad powers of censorship, in the form of a `heckler's veto,' upon any opponent of indecent speech . . .").

Even if the state did have a "compelling interest" to protect invasions of privacy as a content based category, when it punishes only "intimate visual material" it goes beyond the content and to the viewpoint, for example a defendant can invade privacy by sharing drug activity or racist activity online, but only that "intimate visual material" which is prohibited. This is apparent, because the "harm" that the statute is meant to protect, is the harm of the negative viewpoints formed by members of the public regarding their reputation, and not the harm in their property or privacy interest given that even the owners of copyright of photos consensually made can be prosecuted under this statute.

See Sorrell v. IMS Health, Inc., 564 U.S. 552, 571 (2011) (In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory.)

See also R. A. V. v. St. Paul, 505 US 377, 383 - 384 (1992)

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)— not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.

See also Rosenberger v. Rector and Visitors of Univ. of Va., 515 US 819, 829 (1995)

> Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Moreover this statute is an artfully plead copyright claim and is completely preempted by the copyright act, because the law seeks to "control the artistic work itself" Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134, 1142 (9th Cir. 2006), since many circuits have held that the right to privacy (publicity rights) are preempted by the copyright act 17 U.S.C. 301, and the statute would stand as an obstacle or would cause inevitable conflict with copyright owners use of their rights and exceptions such as fair use.

The issue therefore, is whether section 21.16 is preempted by 17 U.S.C. § 301(a). See, e.g., Laws, 448 F.3d at 1137. 17 U.S.C. § 301(a) preempts plaintiff's claims if (1) "plaintiff's work come[s] within the subject matter of copyright" and (2) the legal or equitable rights granted under state law "are equivalent to any of the exclusive rights within the general scope of copyright." Montz v. Pilgrim Films & Television, 649 F.3d 975, 979 (9th Cir. 2011). "a right is equivalent to one of the rights comprised by a copyright if it is infringed by the mere act of reproduction, performance, distribution or display."

Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663, 676-77 (7th Cir. 1986)

The gravamen of the right protected by section 21.16 is the right to control to disclosure of images, which is equivalent to the rights in 17 U.S.C. § 106 because "In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work. See Fox Film Corp. v. Doyal, 286 U. S. 123, 286 U. S. 127 (1932)" Stewart v. Abend, 495 U.S. 207, 229 (1990). Likewise the extra elements do not save the law from preemption from copyright, Grosso v. Miramax Film Corp.,383 F.3d 965, 968 (9th Cir. 2004). "By contrast, we have found a state law claim preempted when the extra element changes the scope but not the fundamental nature of the right."

In Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012):

> "We pointedly note that we address the unpublished status of the photos only under copyright principles, not privacy law. See Bond v. Blum, 317 F.3d 385, 395 (4th Cir.2003) ("the protection of privacy is not a function of the copyright law."). "It may seem paradoxical to allow copyright to be obtained in secret documents, but it is not. [F]ederal copyright is now available for unpublished works that the author intends to never see the light of day."

In Garcia v. Google, Inc. 786 F.3d 733, 745 (9th Cir. 2015):

> "This relief is not easily achieved under copyright law. Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from — and incompatible with — copyright and copyright's function as the engine of expression." ... "Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a "right to be forgotten," although recently affirmed by the Court of Justice for the European Union, is not recognized in the United States."

In Maloney v. T3Media, Inc., 853 F. 3d 1004, 1011 (9th Cir. 2017):

> "Plaintiffs' ... challenge "control of the artistic work itself." Laws, 448 F.3d at 1142. Pursuant to Laws, the subject matter of the state law claims therefore falls within

> the subject matter of copyright. We believe that our holding strikes the right balance ... permitting photographers, the visual content licensing industry, art print services, the media, and the public, to use these culturally important images for expressive purposes. Plaintiffs' position, by contrast, would give the subject of every photograph a de facto veto over the artist's rights under the Copyright Act, and destroy the exclusivity of rights that Congress sought to protect by enacting the Copyright Act."

The argument that a person can move the dispute from one sounding in copyright to one in contract, because of an constructive, implied in fact, or even oral promise not to disclose the material, 17 USC § 204 requires that in order to transfer such a right the transfer would have to be done in writing. See Jules Jordan Video, Inc. v. 144942 Canada Inc., 617 F. 3d 1146, 1157 (9th cir 2010) "Section 204(a) is designed to resolve disputes between owners and transferees and to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership."

Likewise a breach of implied contract claim was preempted by the copyright, because the promise not to disclose, would logically interfere with the rights of the copyright owner. See e.g. Montz v. Pilgrim Films & Television, Inc., 606 F. 3d 1153 , 1159 (9th cir 2010)

> "The complaint contends that "the Plaintiffs' disclosure of their ideas and concepts [was] strictly confidential," and that "[b]y taking the Plaintiffs' novel ideas and concepts, exploiting those ideas and concepts, and profiting therefrom to the Plaintiffs' exclusion, the Defendants breached their confidential relationship with the Plaintiffs." Such claim simply echoes the allegations of the breach-of-implied-contract claim, which we have already deemed preempted. Indeed, the alleged breach of confidence stems from an alleged violation of the very rights contained in § 106 — the exclusive rights of copyright owners to use and to authorize use of their work. Given that the plaintiffs' breach-of-confidence claim is not qualitatively different from a copyright claim, we conclude that it was also properly dismissed."

Numerous Courts, including the Ninth Circuit, have found that the preemption provision of the Copyright Act, 17 U.S.C. § 301(a), completely preempts certain state-law claims

falling within its scope See, e.g., Laws v. Sony Music Entertainment, Inc., 448 F.3d 1134, 1146 (9th Cir. 2006) (upholding complete preemption of state right of publicity under the Copyright Act); Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 306-307 (2d Cir. 2004) (upholding complete preemption of state unjust enrichment and declaratory judgment claims under the Copyright Act); Rosciszewski v. Arete Associates, Inc., 1 F. 3d 225, 232 - 233 (4th Cir 1993) (upholding complete preemption of state Computer Crimes Act claim under the Copyright Act), Ritchie v. Williams, 395 F.3d 283, 286-87 (6th Cir. 2005) (upholding complete preemption of state contract and tort claims under the Copyright Act); Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285, 1289-91, 1293-98 (11th Cir.2004) (suggesting that the Copyright Act might have complete preemptive effect under some circumstances); GlobeRanger Corp. v. SOFTWARE AG, 691 F. 3d 702, 706 (5th Cir 2012)(upholding complete preemption of conversion claims);

See e.g. Rosciszewski v. Arete Associates, Inc., 1 F. 3d 225, 232 - 233 (4th Cir 1993)

> The grant of exclusive jurisdiction to the federal district courts over civil actions arising under the Copyright Act, combined with the preemptive force of § 301(a), compels the conclusion that Congress intended that state-law actions preempted by § 301(a) of the Copyright Act arise under federal law.[6] Accordingly, we hold that the preemptive force of § 301(a) of the Copyright Act transforms a state-law complaint asserting claims that are preempted by § 301(a) into a complaint stating a federal claim for purposes of the well-pleaded complaint rule. Since claims preempted by § 301(a) arise under federal law, removal of actions raising these claims to federal district court is proper.

The statute itself is vague, because it requires both a person know when they have "effective consent", and whether the victim had a "reasonable expectation" that they would remain private, which are not defined and require a person of ordinary intelligence to search through case law before safely deciding whether they can speak. See e.g.

Grayned v. City of Rockford, 408 US 104, 108 – 109 (1972)

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act

> accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " `steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

The statement by the court that a defendant could be punished criminally for a reckless action, also does not comport with the requirements of Mens Rea for criminal statute, along with the "breathing space" required for the First Amendment. See e.g. Elonis v. US, 135 S. Ct. 2001, 2011 (2015)

> Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—awareness of some wrongdoing." Staples, 511 U.S., at 606-607, 114 S.Ct. 1793 (quoting United States v. Dotterweich, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," Jeffries, 692 F.3d, at 484 (Sutton, J., dubitante), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," Rogers v. United States, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing Morissette, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). See 1 C. Torcia, Wharton's Criminal Law § 27, pp. 171-172 (15th ed. 1993); Cochran v. United States, 157 U.S. 286, 294, 15 S.Ct. 628, 39 L.Ed. 704 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind").

Dated: 06/30/21

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that, on 02/27/19, I served electronically a copy of this brief on counsel of record, as listed below:

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